

India : Disingenuous Diplomacy to Push Forward BJP's Nuclear Policy

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In his *Agenda for nuclear diplomacy* [1], the author, Rakesh Sood, has rather intriguingly tied up two different issues together.

But before taking that up, let's look into the claim made by the author right at the very beginning of his article : « On June 22, the Narendra Modi government announced that the International Atomic Energy Agency (IAEA) Additional Protocol had been ratified (emphasis added). »

This appears to be rather misleading. On two counts. One, while some of the news reports indicate the ratification as an accomplished fact, some others indicate otherwise. For example : « I can confirm that we are ratifying (emphasis added) the Additional Protocol to the IAEA Safeguards Agreement, » said Syed Akbaruddin [on June 23], spokesman for the Ministry of External Affairs.[2]

What, in this regard, is far more important is that while the Additional Protocol had been signed by the Government of India (GoI) back in early 2009 (March 15, as reported by Sood in his subject article ; while the IAEA site [3], however, reports that the Additional Protocol was actually signed by India on May 15 2009), the ratification was pending for long five years ; and *it was to be ratified by the Indian parliament*. Here is an authoritative testimony to that effect : « The Indian parliament must ratify the [additional] protocol for it to enter into force. » [4] While the UPA never presented the « additional protocol » before the Indian parliament for ratification, nor did the NDA during the last (brief) session of the parliament (from June 4 to June 11).

So, the version given out by the Reuters, and also a few others, to the effect that India has given a commitment that *it would be ratifying* the Additional Protocol appears to be the correct position in this regard.

It is rather striking that how Sood, who should be knowledgeable enough on this issue given his career profile, committed such an obvious slip. (So is the deafening silence all around as regards the fact that the Indian parliament is yet to ratify the Additional Protocol as required.)

This actually takes us to the issue why the ratification of the Additional Protocol remained pending for more than five years since signing of it by the GoI.

The reason is rather simple. There was virulent opposition to the Indo-US Nuclear Agreement [5] both by the Left Front and the BJP. (The Additional Protocol [6] was only a part of the process to get that Agreement clinched.) The Left Front withdrew its outside support to the UPA-I government on this issue and the BJP not only voted against the confidence motion which had to be moved as a consequence of the withdrawal of the Left support but also created a great ruckus in the Lok Sabha during the debate on the motion. The BJP had also publicly committed to renegotiate the Agreement as and when it comes to power [7]. The BJP position as regards the Indo-US nuclear deal is quite succinctly captured in these words (of its own, spelled out in August 2008) : « [The] BJP and many other political parties stand firmly in opposition to the deal. ... (I)n the [India-specific Nuclear] Safeguards Agreement India has not been accorded the status of a nuclear power state in line with

USA, Russia, UK, France and China. BJP feels that as a consequence of this deal India will not be able to conduct a nuclear test if any time, in future, it thinks it is necessary in the interest of defence and security of the country. It will also come in the way of India becoming a nuclear power state. It will compromise with our national sovereignty and our strategic interests. » [8] There was also specific objection to India-specific Nuclear Safeguards Agreement and the Additional Protocol (on the ground that it'd curb India's nuclear sovereignty) The ferocity of the opposition to the deal is the only reason one can think of why the Additional Protocol was not presented to the Indian parliament for long five years even after it being signed by the GoI. Sood's own explanation that the issue « was left pending ratification because there were other, more difficult and more critical issues that needed to be tackled first » sounds utterly unconvincing. Sood, as it appears, just does not want his readers to revisit the stand taken by the BJP on this issue (only in the recent past) given its complete U-turn now, without offering even the faintest hint of any explanation whatever. (The Presidential address to the joint session of the parliament delivered on June 9 (in its 31st para) just blandly informs : « The international civil nuclear agreements will be operationalized and nuclear power projects for civilian purposes will be developed. » [9] "Renegotiation" is just a completely forgotten idea !

So then why the (somewhat ambiguously worded) official announcement as regards India ratifying the IAEA Additional Protocol at this particular point of time ? For that we'll have to look into the precise chronology of a few closely related events.

It was on Monday, June 23 (not June 22 - a Sunday, as indicated by Sood), the announcement was made.[10] The same Reuter news report, confirming the date, also informs : « In a report last week, a defence research group said one Indian enrichment facility, located near Mysore, was undergoing an expansion and could be capable of producing a large surplus of weapons-grade uranium from mid-2015. » The « report » referred to above had actually been released on June 20.[11] The key portion of the report reads : « IHS Jane's defense and security intelligence experts have identified a possible new uranium hexafluoride plant at the Indian Rare Metals Plant (IRMP) near Mysore, India. *This site in India will support new centrifuges that will substantially expand India's uranium enrichment capacity, most likely to facilitate the construction of an increased number of naval reactors to expand the country's nuclear submarine fleet, but also, to potentially support the development of thermonuclear weapons.* (Emphasis added.) IHS Jane's experts assess that the new uranium enrichment facility could become operational by mid- to late-2015. » [11] Quite significantly, the Reuters report quoted earlier further informs : « [Indian] Officials have shown displeasure over the [IHS] report, with a newspaper quoting one saying it was »*mischievously*« *timed to influence a meeting this week of the 48-member Nuclear Suppliers Group (NSG) in the Argentinian capital Buenos Aires* (emphasis added). » [10] And another news report tells us : « Days ahead of the June 26-27 NSG meeting in Buenos Aires, India said it was ratifying an agreement, a so-called Additional Protocol, with the International Atomic Energy Agency (emphasis added) to expand oversight over its civilian nuclear program me. » [12] This report also informs that « (a)n influential world body [i.e. the NSG] that controls nuclear exports *will address the sensitive issue of closer ties with India* (emphasis added) - which is outside the nuclear Non-Proliferation Treaty - at an annual meeting this week, a draft agenda obtained by Reuters showed. »

Now, therefore, it won't perhaps be too irrational to connect the dots and thereby infer that if the IHS report (released on June 20) on the discovery of a *clandestine Indian site* meant for uranium enrichment and *potentially supporting a thermonuclear weapons* (or Hydrogen Bombs, in common parlance) development programme was (deliberately) timed to mar India's case in the then forthcoming June 26-27 NSG meet, India's (sudden) announcement as regards ratifying the IAEA Additional Protocol on June 23, without actually doing so, was very much meant to offset its (anticipated) impact. In fact a commentator on and analyst of nuclear issues of very considerable

repute, Mark Hibbs, has been quoted in the aforementioned Reuters news report to have drawn the very same conclusion : « »India sees its ratification of its Additional Protocol as an arrow in its quiver supporting its quest for NSG membership,« said Mark Hibbs, a nuclear expert at U.S. think-tank the Carnegie Endowment. »

Moreover, the negotiations for nuclear trade with the US commenced soon after signing of the relevant agreement between India and the US on October 10 2008.[13 & 14] And accordingly Mithi-Virdi in Gujarat and Kovvada in Andhra were (reportedly) earmarked for supply and installation of nuclear power plants by US-based companies - the former for Westinghouse and the latter for GE Hitachi.[15] And, at no stage, non-ratification of the Additional Protocol was reported as a hindrance.

Not only that, had the real intention been to impress the US President whom the Indian Prime Minister is scheduled to meet only in (late) September then one would have rather waited for the Indian parliament's budget session due in early July (from July 7 - August 14) which would provide an opportunity to get the Additional Protocol actually ratified by the parliament.

And, if still Sood is terming the subject announcement as a move towards boosting India-US nuclear trade (echoing the official position [16]), it has apparently twin purposes. One, to help camouflage the real intention. And, two, more importantly, to use this argument as a springboard for launching his public campaign in favour of tweaking the India's Civil Liability for Nuclear Damage Act, 2010 (in sync with the Modi government's anticipated move ?).

Be that as it may, we'll now try to look into the second part, arguably the very core, of Sood's article.

Sood's Central Argument

Sood's central argument is : « Ratifying the Additional Protocol was the low-hanging fruit but significantly, the decision indicates that nuclear diplomacy will remain a priority for the Modi government. *The focus should therefore now shift to resolving the ambiguities of the 2010 Nuclear Liability Law.* (Emphasis added.) Without this exercise, India can only import nuclear fuel for the existing power plants ; it will not be able to undertake the much-needed expansion of the nuclear power sector. It is not only the foreign suppliers who would like clarity on this issue ; Indian vendors are equally concerned about its ambiguities. » And, he further goes on to urge : « *what the Modi government needs to ensure is that supplier liability does not become "infinite" or "open-ended"* (emphasis added). What is necessary is a genuine effort to address the concerns of the suppliers' community so that their liability can be quantified in a manner that does not raise costs to prohibitive levels. » Though Sood is careful enough not to make it explicit, he, in fact, even justifies the concept of supplier's liability in principle (even if just for the record) ; given the present context, the sum and substance of his urging is that that India's nuclear liability law will have to be sufficiently bent to meet the demand of the (potential) suppliers.

But a careful examination of the case would reveal that the actual reality is hugely different from what is being presented. The UPA-II government by laying down the Civil Liability for Nuclear Damages Rules [17], notified on November 11 2011, had already seriously tampered with the very essence of the Civil Liability for Nuclear Damage Act, 2010 [18] enacted by the Indian parliament after due and detailed deliberations, including consultations with different sections of the public, only to appease the potential suppliers. It also tried to go even further, albeit unsuccessfully because of widespread protests. On the strength of a legal opinion obtained from the then Attorney General of India, the UPA-II government wanted to empower the NPCIL to enter into arrangement with nuclear vendors/suppliers from the US wherein the written contract between the NPCIL and the US vendors would contain a clause to the effect that the operator NPCIL has abdicated and waived off

the « right of recourse » as provided under section 17 of the Civil Liability for Nuclear Damage Act, 2010. This move, however, appears to have been silently dropped in the teeth of public outcry. Quite significantly, BJP leader Arun Jaitley, now the Finance-cum-Defence Minister in the Modi Cabinet, had in a signed article opposed the move and termed it legally untenable.[19]

Now, let's come to Sood's specific arguments that under the liability law supplier's liability must not become "infinite" or "open-ended."

The factual position is, as per the Act, the liability of the operator, under sub-section 6 (2) (a) is limited to a maximum of Rs. 1,500 crore for a single accident involving a nuclear reactor of 10 MW or above.[18] Evidently, the liability of the supplier cannot exceed that of the operator. So it is neither "infinite" nor "open-ended." But, far more interestingly, the section 24 of the relevant Rules drastically brings down the limit, in a number of ways.

The sub-section (b) of section 17 of the Act allows the operator recourse, i.e. to claim damages from suppliers when the nuclear accident happens owing to the fault of a supplier, such as a patent or latent defect of equipment or material supplied or sub-standard services provided. The sub-sections (1) and (2) of section 24 of the Rules, arguably, negate this provision.

As regards the time limit, the sub-section (2) of section 24 of the Rules provides that the right to recourse is restricted to either the period of granting of initial license or the product liability period, whichever is longer. The product liability period is a standard warranty period, generally of 12 months after commissioning of the plant. The initial license period is again generally of 5 years duration. « Normally, an operator will have to secure a license before he can start construction. Since the plant construction takes more than 5 years, the initial license period would have expired even before a nuclear plant is commissioned. So with this clause, the Government has effectively limited the period of recourse only to the warranty period. If an accident takes place after 12 months, the supplier will then have no liability. »[20]

The sub-section (1) of section 24 of the Rules provides for « right of recourse [which shall be included in the contract] for *not less than* (emphasis added) the extent of operator's liability under sub-section (2) of section 6 of the Act [i.e. Rs. 1,500 crore in case of a nuclear reactor of 10 MW or more] or the value of the contract itself, *whichever is less* (emphasis added). » Here, things are admittedly a bit hazy. (One wonders whether it's a case of lousy drafting.) While the floor limit of the "right of recourse" is defined (which could very well be the value of the contract), *it does not (explicitly) talk of the upper limit*. So, the upper limit will be as per the sub-section (2) of section 6 of the Act, i.e. Rs. 1,500 crore in case of a nuclear reactor of 10 MW or more.

What, however, is most interesting is the Explanation 2 to section 24 of the Rules. This provides that « an operator's claim under this rule shall in no case exceed the actual amount of compensation paid by him up to the date of filing such claim. » (Emphasis added.) This is nothing less than ridiculous. As per this provision, the accident has to take place, (subsequent to that) the compensation claims have to be filed by the victims, (then) the claims "should be settled and paid by the operator, all within the first 12 months of [commencement of] the operation of the plant, if the operator has to exercise his right of recourse. This is as good as no recourse at all ! »20

In this context, it needs be specifically noted that *the section 24 of the Rules relates only to the sub-section (a) of section 17 of the Act* ; it does not at all mention the sub-section (b) of section 17 of the Act. It thereby, apparently, tries to convey that the Rules make the sub-section (b) of section 17 of the Act infructuous. But all the vendors may not be too impressed. As per alternative (and not too unreasonable) interpretation, the sub-section (b) of section 17 of the Act would continue to stand on its own, untampered by the Rules. (This interpretation (quite plausibly) presumes that sub-sections

(a), (b) and (c) of the section 17 of the Act would operate independently of one another.) And the section 46 of the Act perhaps only further adds to their concerns.

The plain fact, however, remains that in spite of all such acrobatics the foreign vendors, the US-based ones in particular, have still strong reservations about coming to India.

And, that being the case, Sood's plea for « resolving the ambiguities of the 2010 Nuclear Liability Law », in effect, is an argument for fundamentally altering the original Act passed by the Indian parliament – to completely defang it, couched in diplomatic equivocation.

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Notes and References :

1. See :

http://www.thehindu.com/opinion/lead/agenda-for-nuclear-diplomacy/article6152407.ece?homepage=true&utm_content=buffera8b03&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer.

2. See : <http://in.reuters.com/article/2014/06/23/uk-india-nuclear-idINKBN0EY14O20140623>.

Another similar, but even more explicit, example : “Let me confirm to you that the government has decided to ratify the additional protocol (emphasis added) to Indian specific safeguard agreement. We had signed this earlier, what we have decided is to take next step of ratification. This is a signal of our commitment to abide by our international obligations,” the Spokesperson in the External Affairs Ministry said. (Source :

<http://indianexpress.com/article/india/india-others/india-to-grant-greater-ease-to-iaea-to-monitor-its-civilian-nuclear-programme/>.) An equally, or even more, definitive contrary statement :

The ratification, concluded last week (emphasis added), also appears well timed with the meeting on Monday in Buenos Aires of the Nuclear Suppliers Group — the elite 45-country club India aspires to join, which controls the global flows of nuclear wherewithal. (Source :

<http://www.thehindu.com/news/national/india-more-open-to-ninspections/article6139494.ece>.)

3. http://www.iaea.org/safeguards/documents/AP_status_list.pdf.

4. See : https://www.armscontrol.org/act/2009_04/IndiaProtocol.

5. For a highly informed evaluation of the Agreement, see :

<http://centreright.in/2013/03/the-prodigal-state-indias-new-nuclear-clothes/#.U7E-FUATxqI>. For a tentative assessment by this commentator, while the negotiation was still on, from an anti-nuclear peace activist's standpoint, see : <http://www.europe-solidaire.org/spip.php?article10224>.

6. For the text, see : <https://armscontrollaw.files.wordpress.com/2014/06/indias-iaea-ap.pdf>. For a very recent comment on it, see :

<http://armscontrollaw.com/2014/06/23/india-finally-ratifies-its-additional-protocol-but-does-it-mean-a-anything/> ; also see an informed evaluation by Siddharth Varadarajan at <http://www.hindu.com/2009/03/07/stories/2009030755691000.htm>.

7. For example : Describing the Indo-US nuclear deal as a « blind trap » and tantamount to acceding to the NPT regime, BJP today [on October 2 2008] said once it comes to power it would renegotiate the deal and even keep open the right to conduct a nuclear test if need arises. (At : <http://www.rediff.com/news/2008/oct/02nddeal6.htm>.)

8. Source : http://www.bjp.org/images/upload/other_publications/indo_us_deal_e.pdf.

9. See :

<https://in.finance.yahoo.com/news/full-text-of-the-president-s-speech-to-parliament-074449489.html>.

10. See : <http://in.reuters.com/article/2014/06/23/uk-india-nuclear-idINKBN0EY14O20140623>.

11. See :

<http://press.ihs.com/press-release/aerospace-defense-terrorism/ihs-reveals-new-potential-nuclear-enrichment-site-india>.

12. See :

http://articles.economictimes.indiatimes.com/2014-06-24/news/50825758_1_nsg-npt-daryl-kimball.

For a preliminary report on the outcome of the NSG meet, see :

<http://in.reuters.com/article/2014/07/02/nuclear-trade-india-idINL6N0PC43620140702>.

13. See :

http://en.wikipedia.org/wiki/India%E2%80%93United_States_Civil_Nuclear_Agreement#Formal_signing_of_the_deal.

14. « The Indian Government has provided the United States with a strong Letter of Intent, stating its intention to purchase reactors with at least 10,000 megawatts (MW) worth of new power generation capacity from U.S. firms. India has committed to devote at least two sites to U.S. firms. » This is an excerpt from a written statement submitted by William J. Burns, the then Under Secretary for Political Affairs, Department of State, during his oral presentation at the hearing before the Committee on Foreign Relations, US Senate on September 18 2008. (Source : <http://www.gpo.gov/fdsys/pkg/CHRG-110shrg46951/html/CHRG-110shrg46951.htm>.) This was even before the formal signing of the Agreement on October 10 2008.

15. See : <http://www.world-nuclear.org/info/Country-Profiles/Countries-G-N/India/>.

16. For example : “The move is clearly tied to the new government’s push for enhancing energy security, which is slated to have a significant nuclear component. It will not be surprising if countries such as Japan, France and the United States now enhance the level of their civilian nuclear trade with India,” official sources said (emphasis added). (Source : <http://www.thehindu.com/news/national/india-more-open-to-ninspections/article6139494.ece>.)

17. See :

<http://www.prsindia.org/uploads/media/Nuclear%20Rules/Civil%20Liability%20for%20Nuclear%20Damage%20Rules%202011.pdf>.

18. See :

[http://lawmin.nic.in/ld/regionallanguages/THE%20CIVIL%20LIABILITY%20OF%20NUCLEAR%20DAMAGE%20ACT,2010.%20\(38%20OF%202010\).pdf](http://lawmin.nic.in/ld/regionallanguages/THE%20CIVIL%20LIABILITY%20OF%20NUCLEAR%20DAMAGE%20ACT,2010.%20(38%20OF%202010).pdf).

19. See : <http://www.rediff.com/news/column/diluting-nuclear-suppliers-liability/20130922.htm>. The view of the present commentator on this issue, predating Jaitley’s article, is available at <http://www.dianuke.org/attorney-general-interpretation-of-nuclear-liability-law-is-legally-untenable-su>

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20. Source : <http://www.dianuke.org/nuclear-liability-act-and-its-rules-the-tail-wagging-the-dog/>. Also see : <http://www.thehindu.com/opinion/lead/liability-rules-leave-very-little-recourse/article2675389.ece>. Both these analysts, apparently, read “not less than” as provided in the sub-section (1) of section 24 of the Rules as “not more than.”

P.-S.

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